

REMARKS

Applicants have amended claims 1, 28 and 55 to qualify the unpleasant mouthfeel as being in the form of a tingling sensation or astringency. Support for this limitation can be found in the first paragraph of the Background of the Invention and particularly at page 1, lines 22-24. The reason for this amendment is to emphasize that the unpleasant mouthfeel of the selected group of botanicals is derived from the chemical makeup of the botanicals as is well known in the art. Accordingly, Applicants have also amended the aforementioned claims to correlate the select group of botanicals with the particular unpleasant mouthfeel associated therewith. The amendment does not expand of the claims and does not necessitate a further search. It is therefore a proper amendment in response to a final Office Action and entry thereof is respectfully requested.

Applicants gratefully acknowledge the withdrawal of various claim rejections under 35 USC § 112 (pages 2-3) and under 35 USC § 102/103 as set forth on page 3.

All of the claims of the application (claims 1, 3-4, 6-9, 28, 30-31, 33-36 and 55-57) are newly rejected as obvious over Carpenter (U.S. Patent No. 5,637,344) in view of Raymont (AU/A/71904/96) and Seang (WO/94/05260). In support of this rejection, the Office Action acknowledges that Carpenter is silent as to the botanical being one from the list provided in claim 1. Raymont is stated to teach a lozenge

composition, similar to a hard candy composition, which comprises at least one botanical wherein the botanical may be Echinacea. The Office Action concludes that one of ordinary skill in the art would have been motivated to modify Carpenter which discloses cocoa powder with Echinacea to obtain the known benefits of this particular botanical. The rejection is hereby traversed and reconsideration is respectfully requested.

The botanicals specifically identified in claim 1 all share a common feature. They are botanicals that exhibit an unpleasant mouthfeel in the form of a tingling sensation or astringency (claim 1 as amended). The tingling sensation and astringency are the result of the chemical makeup of these botanicals. When placed in the oral cavity, the chemical(s) in these botanicals elicit a chemically induced unpleasant response in receptors present in the oral cavity.

Carpenter discloses cocoa powder which also elicits an unpleasant mouthfeel. However, the unpleasant mouthfeel of cocoa is not chemical based; it is physical based owing to the abrasive nature of the particles of cocoa powder. Carpenter teaches that to address the problem of mollifying the unpleasant mouthfeel of cocoa powder, it is necessary to address the physical based unpleasant mouthfeel with a physical process by altering the shape of the cocoa particles from jagged to smooth. This physical process is accomplished by air-jet milling which smoothes the jagged surface of the particles to a degree sufficient to eliminate the physical based unpleasant mouthfeel.

In the present invention, the unpleasant mouthfeel is chemical based and the process to suppress the unpleasant mouthfeel can be regarded as chemical based in that a protective barrier of a chemical based component is placed around the botanical. This is a materially different approach to achieving unpleasant mouthfeel suppression than what is disclosed in Carpenter.

The physical process of air-jet milling would not suppress the unpleasant mouthfeel of chemical based botanicals. If the botanical were in a powder form (like cocoa powder) and therefore possessed a jagged profile, air-jet milling might be successful in smoothing the particles. However, the chemical nature of the smooth particles would remain the same as the original jagged particles. In other words, air-jet milling (the only means of eliminating unpleasant mouthfeel disclosed in Carpenter) cannot eliminate unpleasant mouthfeel that is based on a tingling sensation or astringency associated with the particular botanicals covered by claim 1.

In the previous Office Action, it was alleged that Carpenter, at column 6, beginning at line 58, utilized oil to facilitate mixing of the cocoa powder and the amorphous candy mass which adds to the richness of the final product and improves the texture. However, there is no indication in Carpenter that the presence of this oil is useful in any way to address unpleasant mouthfeel when it is chemical based. Further, the need to use air-jet milling is strongly suggestive that to the extent oil is used in the Carpenter process, it does not suppress unpleasant mouthfeel, otherwise

there would be no need for air-jet milling. Nonetheless, Applicants have now amended claim 1 to indicate that the unpleasant mouthfeel suppressing agent “consists of” one or more partially hydrogenated vegetable oils or saturated fats. This Amendment eliminates any possible interpretation of claim 1 as including other unpleasant mouthfeel suppressing agents including air-jet milling.

Thus, one of ordinary skill in the art, giving a fair interpretation to the Carpenter reference, would appreciate that Carpenter addresses a problem of unpleasant mouthfeel directed to a different active agent and does so in a manner which is materially different than the claimed invention. One of ordinary skill in the art would recognize that Carpenter is directed to a process of suppressing physical based unpleasant mouthfeel from a substance (cocoa powder) whose unpleasant mouthfeel is the result of the physical structure of the particles and not chemical constituents.

Raymont is stated to teach a composition which comprises at least one botanical such as Echinacea. The Office Action states that it would have been obvious to one of ordinary skill in the art to substitute Echinacea in Carpenter because Echinacea has known benefits. Applicants respectfully disagree.

Echinacea has a chemical-based unpleasant mouthfeel. Carpenter teaches a material which has a physical based unpleasant mouthfeel and a physical process for addressing that problem. One of ordinary skill in the art substituting Echinacea in

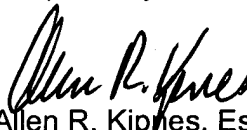
Carpenter would expect the same physical change to particles of Echinacea, but would recognize that the unpleasant mouthfeel would not be suppressed. This is because air-jet milling eliminates the jaggedness of the particles but does not provide any means of suppressing chemical based unpleasant mouthfeel. Therefore, the conclusion reached in the Office Action that a skilled artisan would routinely substitute Echinacea for cocoa powder is without foundation.

Seang is stated to teach that lipids (oils and fats) were known for masking the bitter taste of drugs. There is no mention in this reference that such lipids could be used to address the tingling sensation or astringency associated with the chemical based unpleasant mouthfeel of the group of botanicals in claim 1. The allegation that one of ordinary skill in art would take a lipid from a drug formulation and use it in Carpenter is clearly not based on what Carpenter fairly teaches. Applying Seang to Carpenter would necessitate eliminating air-jet milling because Applicants' claims now limit the unpleasant mouthfeel suppressing agent to only what is recited in claim 1. No matter how the references of record are combined, one of ordinary skill in the art would not arrive at the present invention where partially hydrogenated vegetable oils or saturated fats are the only unpleasant mouthfeel suppressing agent used to suppress the chemical based unpleasant mouthfeel of the recited botanicals. The skilled artisan must, when combining the references, include the air-jet milling of Carpenter because it is the essence of what Carpenter teaches. Applicants have eliminated air-jet milling (and any other physical based suppression agent) for the select group of botanicals. This discovery is not routine but clearly inventive.

On page 7, the Office Action emphasizes that the test of obviousness is what the combined teachings of the references would have suggested to those of ordinary skill in the art. Applicants do not disagree. However, no matter how the references are combined, one of ordinary skill in the art could not have routinely arrived at the presently claimed invention because nowhere is there a teaching or suggestion that for a select group of botanicals, one or more partially hydrogenated vegetable oils or saturated fats can be used as the sole vehicle for suppressing unpleasant mouthfeel. The test for obviousness therefore has not been met and the claims as presently presented are deemed patentable over the prior art.

In view of the foregoing, Applicants submit that the claims as amended are patentable over the prior art and early passage to issue is therefore deemed proper and is respectfully requested.

Respectfully submitted,



Allen R. Kipnes, Esquire
Registration No. 28,433
Attorney for Applicant

Address All Correspondence to:
Allen R. Kipnes, Esquire
WATOV & KIPNES, P.C.
P.O. Box 247
Princeton Junction, NJ 08550
(609) 243-0330